

1 IN THE SUPREME COURT OF THE UNITED STATES

2 - - - - -X

3 REGINALD A. WILKINSON, :

4 DIRECTOR, OHIO DEPARTMENT :

5 OF REHABILITATION AND :

6 CORRECTION, ET AL., :

7 Petitioners :

8 v. : No. 04-495

9 CHARLES E. AUSTIN, ET AL. :

10 - - - - -X

11 Washington, D.C.

12 Wednesday, March 30, 2005

13 The above-entitled matter came on for oral
14 argument before the Supreme Court of the United States at
15 10:15 a.m.

16 APPEARANCES:

17 JAMES M. PETRO, ESQ., Attorney General, Columbus, Ohio; on
18 behalf of the Petitioners.

19 DEANNE E. MAYNARD, ESQ., Assistant to the Solicitor
20 General, Department of Justice, Washington, D.C.; on
21 behalf of the United States, as amicus curiae,
22 supporting the Petitioners.

23 JULES LOBEL, ESQ., Pittsburgh, Pennsylvania; on behalf of
24 the Respondents.

25

1	C O N T E N T S	
2	ORAL ARGUMENT OF	PAGE
3	JAMES M. PETRO, ESQ.	
4	On behalf of the Petitioners	3
5	DEANNE E. MAYNARD, ESQ.	
6	On behalf of the United States,	
7	as amicus curiae, supporting the Petitioners	20
8	JULES LOBEL, ESQ.	
9	On behalf of the Respondents	29
10	REBUTTAL ARGUMENT OF	
11	JAMES M. PETRO, ESQ.	
12	On behalf of the Petitioners	57
13		
14		
15		
16		
17		
18		
19		
20		
21		
22		
23		
24		
25		

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25

P R O C E E D I N G S

(10:15 a.m.)

CHIEF JUSTICE REHNQUIST: We'll hear argument
now in No. 04-495, Reginald Wilkinson v. Charles. E.
Austin.

General Petro.

ORAL ARGUMENT OF JAMES M. PETRO

ON BEHALF OF THE PETITIONERS

MR. PETRO: Mr. Chief Justice, and may it please
the Court:

The purpose of any hearing process is to get a
better answer. If the question is what happened in the
past, an adversarial fact-finding can help provide the
answers. If, however, the question seeks to look forward
and predict future behavior, then a slightly more limited
procedure will serve to expedite and arrive at the best
possible answer to this predictive question.

JUSTICE SCALIA: General Petro, before you get
into the details of why -- why you think the process here
was all that was due, I'm -- I'm more concerned about the
preliminary question of whether there was a liberty
interest here. I -- I know you haven't challenged the
existence of it, but I'm not sure that lets me off the
hook.

We -- we had a case some years ago in which both

1 sides apparently wanted the statute in existence and they
2 conceded in the -- in the court of appeals that the
3 statute existed and wanted us to say what this
4 presumptively existing statute said. And we held, since
5 there was serious doubt about whether the statute had been
6 properly enacted, we had to reach that question first
7 because we were not going to speculate on what a, you
8 know, hypothetical statute said.

9 And I think you're asking us to do sort of the
10 same thing here. You're -- if -- you know, without even
11 conceding or -- the Government doesn't concede anyway.
12 The United States doesn't. You're asking us to hold that
13 if this is covered by the Due Process Clause, what you've
14 given here is enough. But I don't -- I don't like to
15 speculate on -- on hypothetical questions like that.

16 And it -- it really seems to me that to say that
17 there's a liberty interest here flies in the face of our
18 more reasoned opinions in this area, especially Sandin
19 which -- which has some language that's -- that's almost
20 -- almost right on point. We note also that this -- where
21 is it? Conner's confinement did not exceed similar but
22 totally discretionary confinement in either duration or
23 degree of restriction.

24 I -- I don't understand how this person has a
25 liberty interest in not -- in not being put in a maximum

1 security facility. Presumably you could put all your
2 prisoners in maximum security. I mean, you don't pull
3 their fingernails or anything, do you?

4 MR. PETRO: No -- no, we don't, Your Honor.

5 JUSTICE SCALIA: So there's -- there's no Eighth
6 Amendment problem.

7 MR. PETRO: No.

8 JUSTICE SCALIA: So if you wanted to, you could
9 put all of your prisoners in maximum security. Right?

10 MR. PETRO: Yes, I agree, Your Honor, that we
11 could.

12 JUSTICE SCALIA: So where is the liberty
13 interest here? I don't understand.

14 MR. PETRO: We -- we made a decision in
15 petitioning the Court that the liberty interest issue was
16 something that we would not raise. We raised it on appeal
17 through the district court and through the circuit court.
18 We chose not to raise it here to focus on the due process
19 issue.

20 JUSTICE SCALIA: Well, I understand, but I feel
21 like something of a fool being asked, you know, Justice
22 Scalia, if -- if there were a liberty interest here, would
23 these procedures be enough to secure it. That's not the
24 kind of work I usually do. I -- you know, I usually ask
25 -- answer real questions.

1 MR. PETRO: The -- the circuit court made a
2 factual determination that there was a significant and
3 atypical deprivation. We would respectfully disagree with
4 that determination, but because it was a factual
5 determination, we chose to confine our appeal to the issue
6 of law.

7 JUSTICE O'CONNOR: Well, but there is a -- there
8 is a question of law involved as to whether there's a
9 liberty interest.

10 MR. PETRO: Yes.

11 JUSTICE O'CONNOR: In the Sandin case in 1995,
12 this Court said that prisoners have a State-created
13 liberty interest only where the deprivation or restraint
14 imposes atypical and significant hardship on the inmate in
15 relation to the ordinary incidents of prison life.

16 Now, I guess to be categorized in category 5 in
17 your State, it does involve putting someone in solitary
18 confinement, reducing their time for exercise, and
19 reducing their options for parole. Is that correct?

20 MR. PETRO: That is correct. But when people
21 are moved to level 5, Your Honor, typically they're being
22 moved from level 4, at least more than 90 percent of the
23 time, and level 4 has a similar area of restriction. In
24 reality, I would argue -- and I would concur with Justice
25 Scalia -- that this is not a significant or atypical

1 deprivation --

2 JUSTICE O'CONNOR: Well, do you take the -- why
3 don't you simplify it by telling us whether you take the
4 position today that there is or is not a liberty interest
5 here?

6 MR. PETRO: Your Honor, we chose not to --

7 JUSTICE O'CONNOR: I know you did.

8 MR. PETRO: -- petition on that.

9 JUSTICE O'CONNOR: I'm asking you your opinion.

10 MR. PETRO: Your Honor, I would be most pleased
11 to argue that there is no liberty interest in this
12 instance under Sandin. The Court made it very clear that
13 where there is a mandatory State-created interest, that
14 interest would have to involve a significant and atypical
15 deprivation. In this instance, we do not believe that
16 moving an inmate to level 5 classification is a
17 significant or atypical deprivation.

18 JUSTICE STEVENS: What if he were moved from
19 level 1 to level 5?

20 MR. PETRO: Your Honor, that has not occurred in
21 reality. There have been several inmates that have moved
22 from admission to level 5.

23 JUSTICE STEVENS: But why isn't the comparison
24 the entire prison population rather than just 5 versus 4?

25 MR. PETRO: Your Honor, it's just typically what

1 occurs, and so there are some circumstances where a level
2 3 inmate may be moved to 5, but in any event, that inmate
3 would have been moved to 4. The classification jump is,
4 in a practical standpoint --

5 JUSTICE STEVENS: Well, is it -- is it your view
6 that we should consider it the normal practice in the Ohio
7 system to keep people in solitary for 23 hours a day?

8 MR. PETRO: Your Honor, that's not the normal
9 practice. In fact, it involves --

10 JUSTICE STEVENS: Well, then isn't that the
11 standard of reference that we should use?

12 MR. PETRO: Your Honor, it involves a small
13 number of inmates, and those inmates have been determined
14 through a very predictive determination that -- that in
15 fact they do pose a threat --

16 JUSTICE STEVENS: So we're -- we're dealing with
17 a small number of inmates out of a very large population,
18 but isn't the frame of reference for telling whether it's
19 a liberty interest a comparison to the large population?

20 MR. PETRO: Your Honor, the -- the deprivation
21 is -- is perhaps marginally greater, but I would suggest
22 that it is marginal, and therefore --

23 JUSTICE SOUTER: Well, you say it's marginally
24 greater than 4. It's not marginally greater than 1 or 2
25 certainly.

1 MR. PETRO: Your Honor, I would submit that it
2 is -- it is more -- it is much greater than 4. But
3 whether it represents something that is unexpected by the
4 inmate, in reality the inmate has an expectation of having
5 his liberty essentially extremely limited in this
6 instance --

7 JUSTICE SOUTER: Well, but the -- the point of
8 the case is that the inmate does not expect to be put in
9 solitary confinement for 23 or 23 and a half hours a day
10 for a period of 1, 2, or more years without some process
11 to do it because that is so extraordinarily onerous and so
12 different from the general run of incarceration practice.

13 MR. PETRO: And -- and, Your Honor, we initiated
14 a process. It is our New Policy 111-07, which the
15 district court and then the circuit court ultimately ruled
16 on, where we made --

17 JUSTICE GINSBURG: That -- but that's what --
18 that's what you wanted to talk about, but we're on, first,
19 the preliminary question.

20 MR. PETRO: Yes.

21 JUSTICE GINSBURG: And is -- I think you started
22 to say that you regarded atypical and significant as a
23 fact-finding which was made against you --

24 MR. PETRO: Yes.

25 JUSTICE GINSBURG: -- based on the extreme

1 conditions of this kind of confinement where you don't see
2 another human.

3 MR. PETRO: Your Honor, we would -- I would
4 continue to -- to argue that it is not -- if it is
5 significant and atypical, it is marginally significant and
6 atypical.

7 JUSTICE SCALIA: Wasn't solitary confinement
8 involved in Sandin?

9 MR. PETRO: Yes, it was.

10 JUSTICE SCALIA: Didn't we say in Sandin that
11 solitary confinement was -- was not enough to -- to
12 create --

13 JUSTICE GINSBURG: For how long?

14 JUSTICE SOUTER: 30 -- for 30 days I believe,
15 wasn't it?

16 MR. PETRO: Yes, it was, Your Honor.

17 JUSTICE SOUTER: Not 1 year, 2 years, 3 years.

18 MR. PETRO: No. And in this case the -- but --
19 but level 5 as a classification is a limited confinement.
20 It is reserved for those very dangerous inmates not
21 dissimilar to Sandin.

22 JUSTICE SOUTER: But -- but typically it has
23 been represented maybe -- maybe wrongly -- typically it
24 has been represented that they tend to be in there for a
25 year or 2-year periods.

1 MR. PETRO: Your Honor, they are reviewed from a
2 classification standpoint on an annual basis. They are
3 reviewed from a privilege standpoint -- and there's
4 different levels within 5 -- on a quarterly basis and
5 so --

6 JUSTICE SOUTER: But in -- but in fact, they
7 tend to be in there for the extended periods of time.
8 Isn't that --

9 MR. PETRO: That -- that's correct, Your Honor.

10 CHIEF JUSTICE REHNQUIST: Mr. -- General Petro,
11 I for one would like to hear what you have to say about
12 the question presented in your petition for certiorari.

13 MR. PETRO: Thank you, Mr. Chief Justice.

14 (Laughter.)

15 MR. PETRO: In this instance, the process due,
16 as provided by Ohio, was outlined in New Policy 111-07.
17 That policy was adopted and ultimately then reviewed by
18 the district court. The district court held it to be
19 unconstitutional and added a number of other procedures.

20 The process that was contained in New Policy
21 111-07 was a predictive policy, and it understood --

22 JUSTICE SOUTER: May -- may I just ask you a
23 question about that? I realize that there is a predictive
24 element. I don't think anyone disputes that. One of the
25 points of contention here, as I understand it, is that

1 even the new policy did not give a -- an -- an inmate a
2 statement of the charge or reason for the -- for the
3 reclassification to 5. Is -- is that correct?

4 MR. PETRO: Your Honor, it gave notice, 48 hours
5 in advance, under the new policy --

6 JUSTICE SOUTER: Notice of what?

7 MR. PETRO: Notice of the fact that there would
8 be a reclassification.

9 JUSTICE SOUTER: But did it give notice of the
10 reason for the reclassification? You did such and such.
11 You are such and such kind of person, a gang member. Does
12 it tell him anything?

13 MR. PETRO: It doesn't spell out -- in New
14 Policy 111-07, it doesn't spell out all the evidence, but
15 it gives a basic --

16 JUSTICE SOUTER: No, not the evidence, just the
17 reason.

18 MR. PETRO: It gives a basic statement that
19 you're being considered for reclassification.

20 JUSTICE SOUTER: I -- I know that, but does it
21 say you're being reconsidered for -- considered for
22 reclassification because you hit somebody over the head or
23 because you've shown that you're a member of a gang or
24 some other reason?

25 MR. PETRO: It -- it as a general rule does not

1 have to do that, Your Honor.

2 JUSTICE BREYER: What about -- I mean, the
3 person, if he reads the regulation, would see that it says
4 that to classify him, the State has to show that through
5 repetitive and seriously disruptive behavior, he has
6 demonstrated a chronic inability to adjust as evidenced by
7 repeated class 2 rule violations.

8 MR. PETRO: Yes.

9 JUSTICE BREYER: So I guess he would like to
10 know give me at least a vague idea of what behavior you're
11 talking about and which class 2 rule violations you're
12 talking about. Now, does the notice tell him those two
13 things?

14 MR. PETRO: The notice is very general in its
15 nature. At the time that the hearing actually commences,
16 there's an opportunity to sit down and actually discuss
17 with the inmate, and the inmate can respond in writing or
18 in presence at the -- at the hearing --

19 JUSTICE SOUTER: Well, you say he has the
20 opportunity. Do you actually tell him you are about to be
21 reclassified or our proposal is to reclassify you because
22 you violated this particular regulation by this particular
23 conduct?

24 MR. PETRO: There is -- what initiates the
25 reclassification is a report form that would identify to

1 the inmate --

2 JUSTICE SOUTER: I'm asking you what you tell
3 the inmate, not what initiates your process. Now, please
4 answer my question.

5 MR. PETRO: The inmate, Your Honor, has access
6 to the report form that says specifically what's
7 initiated.

8 JUSTICE SOUTER: At which point does he get --
9 at which point does he get access?

10 MR. PETRO: At the point of notice.

11 JUSTICE BREYER: So -- so this -- I mean, that's
12 what I don't understand what this case is about because I
13 -- I'm amazed that -- I think it is too detailed what
14 they're requiring of you, by far.

15 But the elements are I have to know. I'm an
16 inmate. I want to know what is this about. Suppose I
17 think they're wrong. I need to know how to tell them
18 they're wrong. And the other thing I think I'd need to
19 know is after the committee or the warden decides against
20 me, what are his reasons. I'm not asking for a book. All
21 I want to know are the basic reasons.

22 Now, those things I can't work out from the
23 briefs, quite honestly, whether the new policy gives him
24 those new things, those two things, or doesn't.

25 MR. PETRO: The new policy gives him the basic

1 information that we are asserting that --

2 JUSTICE BREYER: Now, already you say that, but
3 I would think the basic information includes some idea of
4 what my disruptive behavior was and some idea of what the
5 class 2 violations that I was convicted of was. And now,
6 I've heard you both say that he does get it and that he
7 doesn't get it. I'm sure that's my fault, but I want to
8 know, does he get this information before the hearing, or
9 does he not?

10 MR. PETRO: Your Honor, he gets the basic reason
11 for the classification and that's --

12 JUSTICE BREYER: Now -- you heard what I said.

13 MR. PETRO: Yes, I did, Your Honor.

14 JUSTICE BREYER: Does he get what I just said?

15 MR. PETRO: Yes, he does.

16 JUSTICE BREYER: He does.

17 MR. PETRO: He gets the basic information. He
18 doesn't get a list of any evidence.

19 JUSTICE KENNEDY: Well, what does he -- can you
20 -- can you describe it for us what -- he gets 48 hours
21 notice.

22 MR. PETRO: Yes.

23 JUSTICE KENNEDY: Notice that's there's going to
24 be a hearing. What else does he get? Does he get a
25 summary of the written report? Does he get a -- a

1 statement of -- of the reasons? What --

2 MR. PETRO: At the close of the hearing, he --
3 there is --

4 JUSTICE KENNEDY: No. Before the hearing
5 starts, he gets 48 hours notice, but is he -- is he just
6 told there's going to be a hearing in 48 hours and that's
7 it?

8 MR. PETRO: There's going to be a hearing and
9 it's for reclassification, and here is -- here is the --
10 the actual report that actually identifies what has
11 triggered this activity for reclassification.

12 JUSTICE KENNEDY: So he does get the report.

13 MR. PETRO: So he gets --

14 JUSTICE KENNEDY: 48 hours --

15 MR. PETRO: But it's a very bare bones report
16 and it doesn't identify the specific evidence involved
17 which --

18 JUSTICE BREYER: Now, I don't care that he
19 doesn't have the evidence.

20 MR. PETRO: Okay.

21 JUSTICE BREYER: I want to know that he thinks
22 he's being sent to this prison because his roommate, Rat
23 Fink, has made up a bunch of stories about him. All
24 right? So he needs to know whether -- what it is that --
25 that this board is considering before he can come in and

1 explain what it isn't true. He doesn't have to have all
2 the evidence. He has to know what the point is, what the
3 charge is, what the claim is. And you're saying he gets
4 it because he has the report.

5 Is there an example in the record of a report?

6 MR. PETRO: There's an example of the report
7 form that is filled out by the prison officials at the
8 time that a reclassification is going to occur, and the
9 inmate does have access to that report form at the time of
10 notice.

11 JUSTICE STEVENS: May I ask this --

12 JUSTICE GINSBURG: Perhaps we can be concrete.
13 If he -- suppose the charge is he is a gang leader. Will
14 he get notice that says you are being considered for
15 reclassification because you are a gang leader?

16 MR. PETRO: Yes, Your Honor, he does get that
17 notice. He gets that basic form that basically says he's
18 being reclassified.

19 JUSTICE GINSBURG: Not that he's been
20 reclassified, but is the reason -- the reason that you are
21 being reclassified is that you are a gang leader. Those
22 -- those words, you are a gang leader. Will he get those?

23 MR. PETRO: He gets the -- the accusation. He
24 knows the accusation is made from the report form that is
25 prepared by the prison officials. So he knows --

1 JUSTICE STEVENS: May I --

2 MR. PETRO: -- that one of those criteria has
3 been asserted --

4 JUSTICE STEVENS: May I ask you this question?

5 MR. PETRO: Yes, Your Honor.

6 JUSTICE STEVENS: I'm just -- is the procedure
7 you're describing the procedure that was reviewed by the
8 district court?

9 MR. PETRO: The procedure. Yes, it is. New
10 Policy 111-07 is what the district court reviewed and then
11 what was further reviewed by the circuit court.

12 JUSTICE STEVENS: So the evidence in the record
13 before the district court describes exactly what you're
14 describing.

15 MR. PETRO: The evidence that's in the record
16 was the procedure in place prior to the enactment of New
17 Policy 111-07, and the court choose -- chose to review for
18 procedural purposes Policy 111-07 and then make its
19 decision based on New Policy 111-07. So the evidence
20 that's in the record, the testimony at the -- during the
21 trial, really is not relevant to this policy. It's
22 relevant to the former policy.

23 If -- if --

24 JUSTICE SOUTER: General Petro, I -- I don't --
25 I'm going to ask you a very tendentious question, but it's

1 something I don't want to make a mistake on. Going back
2 to your answer to Justice Ginsburg's question, when he is
3 given what you described as the bare bones report at the
4 beginning of the proceedings, when he gets the 48-hour
5 notice, will in her example the bare bones report say you
6 are being reconsidered for reclassification because you
7 are believed to be a gang leader? Does he get the gang
8 leader information?

9 MR. PETRO: Yes, he does generally. It doesn't
10 give any evidence. It simply is --

11 JUSTICE SOUTER: No. I'm not --

12 MR. PETRO: Okay.

13 JUSTICE SOUTER: I'm not worried about evidence.

14 MR. PETRO: I understand.

15 JUSTICE SOUTER: Just I want to know the charge.
16 Will he always get the charge?

17 MR. PETRO: He will get the -- there is a form
18 that is completed, a long form that is completed by the
19 prison officials that basically stipulates the predicate
20 act or the predicate acts that really result in the
21 reclassification action.

22 JUSTICE SOUTER: So that in the gang leader
23 example, he will be told that it's because he is accused
24 of being a gang leader that this is occurring.

25 MR. PETRO: Yes, because that is part of the

1 form.

2 With the Court's permission --

3 JUSTICE STEVENS: And the form -- and the form
4 is in the record, I take it.

5 MR. PETRO: Yes, it is.

6 With the --

7 JUSTICE STEVENS: Where?

8 MR. PETRO: With the Court's permission, I'd
9 like to reserve the balance of my time.

10 CHIEF JUSTICE REHNQUIST: Thank you, General
11 Petro.

12 Ms. Maynard, we'll hear from you.

13 JUSTICE STEVENS: Ms. Maynard, before you start,
14 maybe you could answer the question I tried to ask at the
15 end of his argument. Where in the record is the report?

16 ORAL ARGUMENT OF DEANNE E. MAYNARD

17 ON BEHALF OF THE UNITED STATES,

18 AS AMICUS CURIAE, SUPPORTING THE PETITIONERS

19 MS. MAYNARD: JA-58 is the form, and if you look
20 at that, you'll see that it has a line that says, you are
21 being considered for a transfer for the following reasons,
22 colon, and there's a blank to be filled in.

23 Mr. Chief Justice, and may it please the Court:

24 The procedures that Ohio provides for placement
25 into its supermax prison facility are more than ample to

1 satisfy due process.

2 As the Federal Government has argued in its
3 brief, the Bureau of Prisons believes there is no liberty
4 interest implicated here. But even if one assumes that
5 there is, the type of decision at issue is inherently a
6 predictive one that turns on the holistic judgment of
7 prison officials.

8 JUSTICE GINSBURG: Why is it a predictive
9 judgment that a person is a gang leader? The ultimate
10 decision, given the facts and circumstances, we predict
11 that this person is among the worst of the worst, but the
12 findings that have to be made along the way are not
13 necessarily predictive. I mean, it -- it would be nice if
14 the -- if the issues came simply divided what happened in
15 the past, what might happen in the future, but the
16 judgment that's made to classify someone as 5 inevitably
17 involves some, well, what happened in the past on the
18 basis of which we can project what might happen in the
19 future.

20 MS. MAYNARD: That's true, Justice Ginsburg. We
21 would have three responses to that.

22 One is first in Ohio, as in the Federal Bureau
23 of Prisons, in the large majority of instances, most of
24 the facts upon which a predictive assessment would turn
25 have already been subject to some more formal type --

1 trial-type procedure. For example, in the Bureau of
2 Prisons, the vast majority of prisoners who are placed in
3 one of our two more restrictive facilities have committed
4 some violent act in prison for which they have been found
5 to be guilty pursuant to formal Wolff-type, trial-type
6 procedures.

7 Secondly, with respect to facts that might be
8 taken into consideration for which there hasn't yet been
9 such a formal trial-type proceeding, this Court has made
10 clear that when you're talking about the types of
11 predictive risk assessments that are at issue here, it is
12 appropriate for prison officials, using their expertise
13 and judgment and knowledge of the prison conditions in
14 their prison and in the prison system as a whole, to take
15 into account things that are rumor, innuendo, and other
16 imponderables that may not have been proven in any fact-
17 type proceeding.

18 JUSTICE GINSBURG: But that would be -- that
19 would be a what happened question, not what might happen.
20 What happened, the determination might be made on the
21 basis of rumor or innuendo. My only point is that
22 questions don't come labeled so simply, predictive versus
23 what happened in the past.

24 MS. MAYNARD: That's true. I agree with that.
25 But again, I believe that most of the -- the facts upon

1 which these decisions are based and -- and Ohio asserts in
2 its brief that that's the case in their case too, that
3 people who are placed in level 5 have either been subject
4 of a rule board's infraction hearing or have committed a
5 crime for which they've been convicted while in prison.

6 JUSTICE GINSBURG: And suppose neither of those
7 are -- are so.

8 MS. MAYNARD: Well, I -- as I say, I think in
9 the vast majority of cases, in both the Federal system and
10 Ohio, that is the case. But even so, the consideration at
11 issue takes into a broader spectrum of consideration than
12 just the individual inmate. Having the type of formal
13 fact-finding retrospective proceeding that the court below
14 required here is going to focus the decision-maker in the
15 wrong direction and on a more narrow set of facts than
16 ideally we want the prison administrators to focus upon.
17 We want them to be looking at, just like in Hewitt, the
18 relationship of this inmate to other inmates, of inmates
19 within the prison generally, of inmates to this inmate,
20 and the safety of others. So there's more of them at
21 stake. There are other private interests at stake besides
22 those of the individual who may be moved in the prison
23 administration's --

24 JUSTICE KENNEDY: Well, those two, it seems to
25 me, are all questions of -- of fact. I mean, ultimately

1 your position may be correct, but I -- I just can't place
2 a lot of store in this predictive versus nonpredictive
3 judgment, and it's contrary to your own argument. You
4 say, well, in almost all the cases, it's because he's been
5 convicted of a crime in prison and so forth. Well, that
6 -- that undercuts, it seems to me, the -- the basic
7 argument that you're trying to make that established this
8 line between predictive and nonpredictive judgment.

9 I -- I suppose you would say even in cases where
10 it is a matter of past effect, these procedures are -- are
11 adequate. Or would you?

12 MS. MAYNARD: Yes. We believe that the
13 procedures that Ohio provides are -- are more than
14 adequate because it gives the prisoner notice of the
15 charges and an opportunity to contest the placement
16 decision. In fact, we believe that the -- the process
17 that Ohio provides is more than is necessary to satisfy
18 due process.

19 JUSTICE SCALIA: Ms. Maynard, this is a class
20 action, isn't it?

21 MS. MAYNARD: Yes, it is, Justice Scalia.

22 JUSTICE SCALIA: What if -- what if for some of
23 the prisoners, maybe a majority of the prisoners, this --
24 this reality of having a prior factual hearing exists, but
25 for some of it, it doesn't? What -- what disposition

1 would this Court then make of the case?

2 MS. MAYNARD: There's -- still, the appropriate
3 analysis, when you're talking about -- basically what we
4 have at bottom --

5 JUSTICE SCALIA: But I mean, suppose I think
6 that a -- a trial-type proceeding is necessary, and in
7 fact, it's been given for most of the people in this class
8 action, but not for the rest. What happens to the case?

9 MS. MAYNARD: It seems to me that you hold that
10 -- that the procedures here are adequate because -- under
11 the Due Process Clause because in the broad range of
12 cases, you're going to have sufficient notice and an
13 opportunity to contest.

14 Again, I think it's really important to
15 understand the nature of the decision issued here. It's
16 really a gestalt judgment of prison officials exercising
17 their expertise in an area that this Court has repeatedly
18 said prison officials get a wide range of deference.

19 Again, I would like to make a point about the
20 Federal Bureau of Prisons because the respondents have
21 pointed to our control unit procedures which are more
22 trial-like. And I just want to let the Court know that
23 those procedures were imposed upon the Federal Government
24 and the Bureau of Prisons pursuant to a court order in
25 1978 before this Court issued its decision in cases such

1 as Hewitt where the Court made clear this distinction
2 about prison placement and issues involving the judgment
3 and predictive decisions of prison administrators. When
4 the Bureau of Prisons has been --

5 JUSTICE GINSBURG: Did you ask for -- did the
6 Government move for modification of a decree? I -- I
7 assume that it was not a decision of this Court. You said
8 this -- what you do in the supermax at the Federal level
9 has been imposed by a court. Which court?

10 MS. MAYNARD: Let me clarify one thing. What --
11 it would be -- this relates only to the control unit,
12 which is now at -- at -- in -- in part of the ADX Florence
13 facility. It does not apply to the general populations of
14 the ADX Florence facility and the Marion facility.

15 JUSTICE GINSBURG: Well, you talked about
16 something being imposed.

17 MS. MAYNARD: Right.

18 JUSTICE GINSBURG: And so I want to know what
19 was imposed, first, by whom, by which court, and what --
20 what the order was.

21 MS. MAYNARD: The injunction was entered by the
22 Eastern District of Illinois and was affirmed by the
23 Seventh Circuit in a case called Bono v. Saxby. And the
24 Federal court -- the -- the Bureau of Prisons adopted the
25 regulations pointed to by the respondents in the C.F.R. as

1 it -- in -- in -- to comply with that injunction. We have
2 not yet sought to have that injunction set aside, but
3 those procedures apply to a very small number of Federal
4 prisoners.

5 JUSTICE GINSBURG: But even so, I mean, you were
6 saying this was forced on -- on the -- effectively on the
7 Government. Well, it seems to me if that were the case,
8 you would, after this Court rendered the decisions it did
9 in Hewitt and Sandin, say, Seventh Circuit, please
10 reconsider. It sounds to me as though you haven't done
11 that so you probably think it's okay.

12 MS. MAYNARD: We don't think it's
13 constitutionally required, Justice Ginsburg. It hasn't --
14 we haven't moved to set it aside because it hasn't caused
15 an administrative burden. There are currently only 49
16 inmates in the control unit at Florence. In the last
17 decade, we have only placed 118 inmates there, and so we
18 were able to cope with these burdensome procedures with
19 respect to those numbers.

20 But it's important to note that what we do when
21 we -- what the Bureau of Prisons does when it was free to
22 decide its own process is detailed at pages 26 to 28 of
23 our brief, and that applies to a large number of
24 prisoners, 550 who are in the general populations of -- in
25 very similar conditions to those in the Ohio State

1 penitentiary. And there we have adopted a much less
2 formal process even than the one that Ohio does, and we
3 believe that is also constitutionally sufficient.

4 JUSTICE SOUTER: Well, is -- is the population
5 with respect to which you have adopted the far more
6 lenient process a -- the population of the control unit,
7 which I understand is comparable to the unit we're talking
8 about in Ohio, or is it with respect to the general
9 maximum security population which is housed in conditions
10 less onerous than the control unit?

11 MS. MAYNARD: It is -- applies to the general
12 conditions in ADX -- the general populations in ADX
13 Florence and USP Marion.

14 JUSTICE SOUTER: Okay, and --

15 MS. MAYNARD: But those conditions, Your Honor,
16 are similar to the Ohio State penitentiary. The
17 difference between -- may I finish, Justice -- Mr. Chief
18 Justice?

19 CHIEF JUSTICE REHNQUIST: Yes.

20 MS. MAYNARD: The -- the difference in the
21 general population, the prisoners are out 10 to 12 hours a
22 week for recreation, and in the control unit, they are out
23 7 hours a week.

24 CHIEF JUSTICE REHNQUIST: Thank you, Ms.
25 Maynard.

1 Mr. Lobel, we'll hear from you.

2 Would you tell us what happened in Mr. Austin's
3 case? I mean, did he get a notice and that sort of thing?

4 ORAL ARGUMENT OF JULES LOBEL

5 ON BEHALF OF THE RESPONDENTS

6 MR. LOBEL: Yes. Yes, Your Honor. May -- Mr.
7 Chief Justice, and may it please the Court:

8 In many of the cases -- and I -- I will try to
9 -- in Mr. Austin's case and many of the other cases,
10 people didn't get a notice. I'd like to try to explain
11 what they get and what they don't get.

12 First, they do not get a final decision which
13 gives them reasons.

14 CHIEF JUSTICE REHNQUIST: Well, could you answer
15 my question first? What kind of notice, if any, did Mr.
16 Austin get?

17 MR. LOBEL: I think Mr. Austin got no notice.

18 JUSTICE KENNEDY: Perhaps you can take us
19 through this chronologically. You -- you began at the
20 end.

21 MR. LOBEL: Okay. The notice they get at the
22 beginning is an -- a notice which sometimes includes the
23 reasons, sometimes it doesn't include the reasons. What
24 the requirement in this policy is and what was found at
25 trial was that often they would get very vague reasons

1 like you're a gang member or a gang leader. Now --

2 JUSTICE BREYER: Then can you just explain that?

3 Because the policy says that he shall get notice and
4 attached to the notice will be a committee report. Then
5 they have a copy of the form that the report is supposed
6 to fill out on page 58 to about page 78 and it's about the
7 most detailed thing I've ever seen. So --

8 MR. LOBEL: Yes, that they don't get. That they
9 do not get.

10 JUSTICE BREYER: Even though -- you mean even
11 though it says that the policy says you should be noticed
12 and you're -- it says, attached to the notice will be a
13 copy of the -- I'm sorry. I'm looking -- am I looking at
14 the wrong place?

15 MR. LOBEL: I think you're reading in the wrong
16 place. But it -- there -- they do attach something, but
17 it's not that long form. That long form is what was never
18 given to the prisoners which would tell them what it is
19 that they were said to have done.

20 For example, if --

21 JUSTICE SOUTER: May I -- may I -- I just want
22 to make sure. There is then a direct disagreement of fact
23 between you and the Attorney General. I understood him to
24 say they got the form that starts at JA-58, and I
25 understand you to be saying they don't.

1 MR. LOBEL: They do not. The form that starts
2 at JA-58 they get, but the form that starts at JA-58 is
3 only one page. It's JA-58. They get that form. That
4 form says you'll tell them the reasons.

5 JUSTICE SOUTER: Yes.

6 MR. LOBEL: So at this -- at -- at -- during the
7 trial, often they didn't get the -- they didn't get any
8 notice.

9 JUSTICE SOUTER: Okay.

10 MR. LOBEL: But now they should get a notice.
11 It should tell them some reason.

12 The problem at trial was that --

13 CHIEF JUSTICE REHNQUIST: You mean a trial
14 before all the -- before they were about to be committed
15 or the hearing at which it was determined whether they
16 would be or not?

17 MR. LOBEL: At the hearing and -- they got a
18 notice. The notice said you're a gang leader. How is a
19 man supposed to respond to a vague notice that I'm a gang
20 leader when he doesn't know what it is that they are
21 saying is their -- is the reason that he's a gang leader?
22 All he could say -- this isn't like a trial. It's not a
23 trial-type procedure. What happens in reality --

24 JUSTICE O'CONNOR: Well, do you think it should
25 be?

1 JUSTICE BREYER: -- and a summary of the
2 evidence relied on. Now, I'm just reading that. What is
3 it I'm reading?

4 MR. LOBEL: That's -- that's the district
5 court's order. That's not what they -- that's the revised
6 policy under the district court's order.

7 JUSTICE BREYER: All right. Where is -- where
8 is --

9 MR. LOBEL: Where is theirs?

10 JUSTICE BREYER: I'm sorry. You go ahead.

11 MR. LOBEL: Their policy is, I believe, on page
12 JA-23. That tells you what they -- they say. He is to be
13 served with a notice of hearing form 48 hours prior to the
14 hearing.

15 That will -- that -- there were problems with
16 this. One is very vague notice. You're a gang leader.
17 They have evidence for why he's a gang leader. In Mr.
18 Roe's case, who's one of the plaintiffs, the evidence
19 which -- which was never told to the prisoner -- the
20 committee didn't even know the evidence. The evidence was
21 that he was hit over the head with a spatula while he was
22 waiting on line at the maximum security lunch line, and he
23 went to the hospital, and he never fought back. And from
24 this, somebody determined that he was a gang leader
25 because the people who were being targeted at that time

1 were gang leaders.

2 Now, if you take a man and say, come before a
3 committee, we're not going to tell you what this is about,
4 just that you're a gang leader, what do you have say for
5 yourself --

6 CHIEF JUSTICE REHNQUIST: Well, what's -- what's
7 wrong with that?

8 MR. LOBEL: Because --

9 CHIEF JUSTICE REHNQUIST: I mean, if he can --
10 if he's not a gang leader, he can tell them why he isn't.

11 MR. LOBEL: He'll say I'm not a gang leader.
12 But if they know and the reason is because he was involved
13 in this fight, which -- in which he didn't fight back, he
14 should be able to then say, well, this guy -- you're
15 wrong. This guy beat me up because I insulted him, or
16 he's been an enemy of mine. He has something to respond.
17 Otherwise, he can just say I'm not a gang leader.

18 CHIEF JUSTICE REHNQUIST: You -- you want a
19 trial-type proceeding.

20 MR. LOBEL: This is a far cry from a trial. A
21 trial -- the State would have to put on witnesses. They'd
22 have to prove something. All you're doing here is saying
23 to the man, we're going to give you an opportunity to
24 respond. And the question is, do you have to give them
25 notice detailed enough? And that's all the district court

1 required was some summary so that it's detailed enough so
2 that he can respond. And really, all they have to do is
3 take that form that they print up, Justice Breyer, which
4 you were looking at, that long form, and copy it and
5 append it to the notice.

6 JUSTICE GINSBURG: Well, there is -- isn't there
7 the problem -- at least Ohio suggested that there is --
8 that if this person is indeed a gang leader and the form
9 says so-and-so and so-and-so effectively ratted on you,
10 those persons who came forward might not live to see
11 another day?

12 MR. LOBEL: And the district court ordered what
13 Ohio does in all its disciplinary proceedings, what the
14 Federal Government does in its disciplinary proceedings,
15 which is if it's confidential information, you don't have
16 to turn it over because they understand that, Justice
17 Ginsburg. The district court understood that.

18 But in Mr. Roe's case, it wasn't confidential
19 that he was hit over the head. Or in Mr. Thompson's case,
20 it wasn't confidential that they said to him, you were
21 present at some fight and they didn't tell who he was
22 fighting and they never were -- they never gave him any of
23 the -- the details so -- to be able to respond.

24 If it's confidential, they don't have to turn it
25 over. The district court --

1 JUSTICE O'CONNOR: But was -- was this under the
2 old policy that you're talking about what occurred?

3 MR. LOBEL: Yes, Your Honor. It was under --

4 JUSTICE O'CONNOR: Yes. And I thought that we
5 had to address this facial challenge insofar as it affects
6 the new policy. And if the State complied with the new
7 policy, what is your complaint with that?

8 MR. LOBEL: The -- the new policy, which really
9 was in all honesty, Your Honor, a tweaked policy or a
10 modified policy -- they took the old policy and they made
11 some changes to it. The question before the Court is
12 whether that new policy fixed the problems. We saw the
13 problems --

14 JUSTICE GINSBURG: Which was never -- never in
15 effect, right? The new policy --

16 MR. LOBEL: Never went into effect.

17 JUSTICE GINSBURG: So all -- the evidence
18 relates to the old policy which I think Ohio recognizes
19 was not adequate. And then there's -- Ohio has this new
20 policy, and you, just on the basis of the written
21 statement of the policy, made the judgment that it's not
22 good enough.

23 MR. LOBEL: It doesn't on -- just on the face of
24 it, it doesn't fix the problem that the district court
25 found. Vague notice. The other thing they would do is

1 they would give the person notice of one reason --

2 JUSTICE O'CONNOR: Well, let -- you keep talking
3 about what happened in the past, and I'm -- I find some
4 difficulty with that because we're being asked to review a
5 new policy. And I would like you to look at the new
6 policy, show us where to find it in the record, and tell
7 us specifically what's wrong with it.

8 MR. LOBEL: I'll give you a very specific --

9 JUSTICE O'CONNOR: Could -- could you refer to
10 something?

11 MR. LOBEL: Page -- look at page 22 and -- 23
12 and 33 of the new policy. Look at 23.

13 JUSTICE O'CONNOR: Where -- where is that?

14 MR. LOBEL: JA-23. Look at JA-23 and look at
15 JA-33.

16 JUSTICE O'CONNOR: All right. I'm on 23. What
17 are we --

18 MR. LOBEL: On 23, you look at the final
19 decision-maker -- the Bureau of Classification -- the
20 bottom line of the next-to-the-last paragraph -- will
21 review the recommendation and any objections filed and
22 make a final decision.

23 Now, here's what was happening, and I --

24 CHIEF JUSTICE REHNQUIST: Is this happening
25 under the new policy?

1 MR. LOBEL: That's the new policy.

2 CHIEF JUSTICE REHNQUIST: But now, you just were
3 going to say here's what was happening. Do you mean under
4 the new policy?

5 MR. LOBEL: No. The question is whether this
6 page 23 fixes what was happening in the past. This is
7 their new policy.

8 CHIEF JUSTICE REHNQUIST: Well, why -- why is
9 that the question? If the new policy meets constitutional
10 standards, why does it have to fix something else?

11 MR. LOBEL: Your Honor, it doesn't meet
12 constitutional standards because it only says the chief
13 has to make a final decision. The chief doesn't have to
14 give any reasons for it, and I don't know of any case in
15 this Court in predictive decisions, in punitive decisions
16 where a -- a decision-maker can send somebody to solitary
17 confinement long-term. And Justice Souter, it's for at
18 least 2 years. Over 200 people there were for more than 3
19 years, which was really the -- the -- only limited by how
20 long the building was open -- and say, I'm putting you in
21 there and I'm not telling you why. And this policy lets
22 them do it, and that's what they were doing.

23 And there's nothing in this policy to change
24 that. And what was happening --

25 JUSTICE BREYER: So I think I've got your point.

1 Tell me if I -- I mean, I've now looked at -- this is very
2 confusing to me. I'm sure it's my fault. But I take it,
3 if you look at page 22, that's the new policy.

4 MR. LOBEL: Exactly.

5 JUSTICE BREYER: And what the new policy says
6 is, committee, you must give the prisoner some
7 information. Then it refers to form 2598. Form 2598 is
8 the form on page 58.

9 MR. LOBEL: Exactly.

10 JUSTICE BREYER: What that tells him is nothing
11 about the facts. That tells him he's been charged.
12 Period.

13 MR. LOBEL: He's been charged for being a gang
14 leader.

15 JUSTICE BREYER: Now, the new policy goes on to
16 say, the classification committee shall document
17 information presented by staff and the inmate which is
18 form 2627 and 2628. And I don't know where 2698 fits in,
19 but 2698 are all those pages with the information.

20 MR. LOBEL: And they don't have to give that to
21 anybody.

22 JUSTICE BREYER: And it just doesn't say
23 anything about them at all.

24 MR. LOBEL: And all the district court was
25 saying --

1 JUSTICE BREYER: So your point is in the past,
2 they didn't give them the information.

3 MR. LOBEL: They didn't give them the
4 information.

5 JUSTICE BREYER: Then they promulgated a new
6 policy and the new policy says nothing about it.

7 MR. LOBEL: Exactly. And that is why it's
8 facially invalid. But if you look at what was happening,
9 you could --

10 JUSTICE O'CONNOR: But form 58 -- I'm -- I'm
11 looking at page 58 -- says that the prisoner will be given
12 this form that says you were referred to the
13 classification committee for the following reasons. And
14 that leaves space to be filled out. What's the matter
15 with that?

16 MR. LOBEL: And -- two problems with that. It
17 could either say you're a gang leader, and second, it
18 could say which --

19 JUSTICE O'CONNOR: This is a facial attack.
20 What in the world is the matter with that, saying you were
21 referred for the following reasons and leaving space to
22 have it filled out? Is that defective under the Due
23 Process Clause?

24 MR. LOBEL: Because you -- at trial we showed
25 what the practice was.

1 JUSTICE O'CONNOR: You showed what happened in
2 the past.

3 MR. LOBEL: And the question is, does this fix
4 it? And what happened in the past was they gave, for
5 example, a prisoner, and it said, here are the reasons.
6 The reason is you stabbed somebody. The committee said,
7 you stabbed somebody. It wasn't very bad. We recommend
8 that you not be put in the place. In over 50 percent of
9 the cases of those committee recommendations on retention,
10 the chief rendered a decision, without giving a final --
11 any real reasons, and used evidence and reasons which were
12 never given to the inmate.

13 In Ohio's brief, they say we could still do
14 that. We only have to give them some reason. For
15 example, we have to say you're a gang member. If it turns
16 out that you're -- turns out you're not a gang member, the
17 chief can say later on, well, you were dealing drugs.
18 That's -- that's not adequate. Facially it's not adequate
19 to give the person some reason and then switch the reason
20 in the middle of the game. And that's what was happening.

21 JUSTICE O'CONNOR: Well, I can understand that
22 you could come on behalf of a prisoner on an as-applied
23 challenge, but to look at this form and tell us it is
24 facially invalid is difficult for me to understand. If --
25 if there are specific incidents where something was

1 defective, then challenge it, but what's the matter with
2 the form?

3 MR. LOBEL: Well -- well, the first thing that's
4 matter with the form is it doesn't require reasons for the
5 decision.

6 JUSTICE O'CONNOR: It's --

7 CHIEF JUSTICE REHNQUIST: Well, why does the Due
8 Process Clause require reasons?

9 MR. LOBEL: Even in Salerno, the -- the -- this
10 Court held that in a preventive case, the bail -- the bail
11 reform statute still requires, as a basic modicum of due
12 process, that you give the person the reason --

13 CHIEF JUSTICE REHNQUIST: That -- that was a
14 statute.

15 MR. LOBEL: That was a statute, and the Court
16 relied on that for why the statute was constitutional.

17 Even in Greenholtz, the parole case, the -- this
18 Court said over and over again that in the -- in the
19 parole decision, which is much more predictive than here,
20 the parole board gave its reasons for why it --

21 JUSTICE O'CONNOR: This form says, state the
22 reasons, and leaves blank space to do that.

23 MR. LOBEL: But that's --

24 JUSTICE O'CONNOR: So what's the matter?

25 MR. LOBEL: That's in the notice. It's not in

1 -- it's not in the decision.

2 JUSTICE BREYER: Well, what it says about --

3 JUSTICE KENNEDY: It -- it seems to me that the
4 -- the facial attack objection would -- would not be --
5 carry much weight if what happened was this. There was a
6 trial. The policies were found deficient, and the court
7 said, you devise some new forms. At that point, it seems
8 to me that the facial attack would -- objection would --
9 would not be relevant. And -- and your point would be
10 right. You say, you know, they -- they haven't -- this
11 doesn't -- is not going to cure the -- the deficiency.

12 But what happened here was that, as I understand
13 it, midway in the litigation there was a new policy, and
14 it -- it seems -- so we have sort of a moving target that
15 we're working with.

16 MR. LOBEL: Yes. Your Honor, it depends --

17 JUSTICE KENNEDY: Could you comment on that?

18 MR. LOBEL: It depends on what you mean by
19 midway. On the eve of trial, as we approached the trial
20 court for trial, they promulgated the new policy which was
21 not supposed to be implemented until several months after
22 trial. And it seems in that situation perfectly
23 reasonable for a district court to say, here are the
24 problems that I've uncovered. I'm going to look at the
25 new policy and see if this new policy fixes it.

1 The -- the problems were not moot, Justice
2 O'Connor. These were ongoing problems. There were 200
3 prisoners who were there under a deficient policy. The
4 question then was, were they entitled to something better?
5 And did this new policy give them something better?

6 And the -- the district court found, I think
7 quite correctly, that it gave them a little better. It
8 was tweaked. It was modified. But on some of the basic
9 questions of whether or not you can bait and switch the
10 reasons, whether you could tell somebody you're in here
11 for drugs and then the classification chief could -- could
12 put him in for something else, or whether you had to give
13 them some reason that he can respond to -- in a situation
14 where you're not having a trial, Mr. Chief Justice, where
15 -- where the State does not have to come forward with any
16 evidence. The only evidence the person is getting of what
17 is his problem is this notice.

18 And the question is, when that is the only
19 evidence -- it's not like a trial like in the Federal
20 courts where you have to present witnesses, you have to
21 meet a standard of proof. It's not even in the -- like a
22 disciplinary trial where you have to meet a certain
23 standard of proof and present witnesses. The committee
24 sits there. The guy comes in and they say to him, tell us
25 why you're not a gang leader. And he says, well, tell me

1 why you think I am a gang leader. And they should be
2 forced to tell him that.

3 CHIEF JUSTICE REHNQUIST: Well, what's wrong
4 with giving him the opportunity to say why he's not a gang
5 leader?

6 MR. LOBEL: How is Mr. Roe going to say I'm not
7 a gang leader because I wasn't hit over the head with a
8 spatula because I'm a gang leader, I was hit over the head
9 with a spatula because the guy doesn't like me, unless he
10 knows that that's why they think he is a gang leader? How
11 could he respond to that? All he could say is I don't
12 know what you're talking about.

13 JUSTICE BREYER: But why can't you do that in an
14 as-applied challenge? I mean, it may be that there was
15 all this -- suppose we wrote an opinion hypothetically.
16 Suppose -- and it said, look, I've read through this new
17 policy. I assume it will be administered in accordance
18 with the elements of due process, the basic elements being
19 some kind of notice basically what -- what the factual
20 part is, some kind of opportunity to present proofs in
21 evidence that's a reasonable one, and some kind of
22 decision by a neutral decision-maker.

23 Certainly the language of the new policy permits
24 such an interpretation. It doesn't -- and -- and suppose
25 we were to say, well, we assume it will have the basic

1 elements, and it's so complex, so detailed that -- that if
2 they don't, then the individual who suffers could bring a
3 claim and say it was administered unfairly in my case.

4 MR. LOBEL: Your Honor, I think as a facial
5 matter, when you're putting somebody in long-term solitary
6 confinement for years and years in a small cell with no
7 possibility of parole, you're -- I think you should give
8 them notice of the reasons in sufficient --

9 JUSTICE BREYER: No, I'm not disagreeing with
10 you.

11 MR. LOBEL: -- in sufficient detail.

12 JUSTICE BREYER: But you see -- yes. I'm -- I'm
13 not disagreeing with you. I'm saying I read their new
14 policy, now having gotten to it the third time through all
15 this detail, and it seems to me that they do give a
16 notice, and Justice O'Connor just pointed out where
17 there's a place for reasons. And as I read what happens
18 after the committee decides, it says, it shall make a
19 decision -- a recommendation accordingly -- according to
20 this very long, detailed form.

21 MR. LOBEL: Right.

22 JUSTICE BREYER: And it doesn't say they won't
23 tell the prisoner. It doesn't say whether they'll tell
24 the prisoner.

25 MR. LOBEL: Right.

1 JUSTICE BREYER: So why can't I assume they will
2 tell him so he'll know what's going on? And then if they
3 don't, you'd have an as-applied challenge.

4 MR. LOBEL: Even if, as an abstract matter, you
5 could assume it, when you've had a 1-week trial with
6 witness after witness, and the witnesses say they're not
7 doing this --

8 JUSTICE BREYER: That was before the new policy.

9 MR. LOBEL: But the new policy is introduced at
10 trial. And the -- the question is -- really what you're
11 saying, Justice Breyer, is the mere introduction of the
12 new policy renders the whole case -- case moot.

13 JUSTICE BREYER: What I'm now saying is I can
14 understand exactly why you might feel the way you do. But
15 our job is to not necessarily take that feeling. But
16 shouldn't we presume that the State will administer words
17 that comport with the basic elements, not every detail as
18 you want, but they will administer this new policy in
19 accord with those basic elements of fairness? Isn't that
20 giving a -- sort of like a deference to the State, which
21 maybe we should?

22 MR. LOBEL: Maybe you should in an ordinary
23 case. Where there's been a trial and it's a clear pattern
24 and practice that they're not, then I think that Friends
25 of the Earth v. Laidlaw says that you have to show that

1 the new policy is going to cure the problem.

2 JUSTICE KENNEDY: Are you -- are you saying that
3 what we have before us is this, a trial which showed that
4 the pre-new policy procedures were deficient and the trial
5 judge and you and a court of appeals interpreted the new
6 policies as remedies for past wrongs that were
7 established? And the question is the adequacy of that
8 remedy. That's one way to look at the case.

9 MR. LOBEL: That's certainly one way.

10 JUSTICE KENNEDY: Another way to look at the
11 case is to say that Ohio admitted that there were some
12 improprieties, showed its new policy, and the case turned
13 on the adequacy of the new policies. Now, those are two
14 different things. Which is this case?

15 MR. LOBEL: But to look at it the second way,
16 you have to show that the problems proved at trial were
17 moot. If the problems are ongoing, then the plaintiffs
18 are entitled to a remedy. You can't say that there are
19 problems that are ongoing, which there were -- they were
20 all --

21 CHIEF JUSTICE REHNQUIST: But how can you know
22 whether the problems are ongoing if the new rules haven't
23 been implemented?

24 MR. LOBEL: Well, they are ongoing at trial.
25 When the trial judge renders his decision, they're

1 ongoing. The question then is looking at this abstractly,
2 it's not a question of in the abstract is it okay, but in
3 the abstract will it cure the problems.

4 CHIEF JUSTICE REHNQUIST: Why -- why isn't it a
5 question of as facially in the abstract is it okay?

6 MR. LOBEL: Yes. Well, as I said, facially in
7 the abstract, I think it's not okay because I think they
8 should have final decision with reasons and notice with
9 sufficient detail for reasons.

10 But even if you don't agree with me on that, I
11 think that this case, when you have an -- when you have a
12 trial and there's a pattern and practice of -- of
13 problems, I don't think that it's proper to simply assume
14 that a piece of paper which says we'll give reasons is
15 adequate when the reasons that they're giving and that the
16 trial shows they're giving are inadequate. They're vague.
17 They're -- they're shifting the ball on people. And I --
18 and I think --

19 JUSTICE STEVENS: May I ask this question, Mr.
20 Lobel? Putting aside for a second which policy we look at
21 and so forth, were there findings that particular inmates
22 were improperly sent to this facility?

23 MR. LOBEL: There -- there were findings that --
24 that there were -- particular inmates were improperly --
25 were sent with no evidence against them.

1 JUSTICE STEVENS: All right, and was there any
2 -- any order saying that inmate should get out and go to a
3 different facility?

4 MR. LOBEL: No. The district court simply
5 ordered that since there was a widespread showing of
6 arbitrary and capricious placement and -- and that there
7 was a showing that they built the prison for 500 -- with
8 500 cells and they didn't need 500 cells and they were
9 putting people in there who didn't need -- who didn't meet
10 the criteria that they set forward -- there was a
11 widespread showing of that. The district court said you
12 should give them new hearings following a procedure which
13 would be sufficient to meet the constitutional Due Process
14 Clause.

15 JUSTICE STEVENS: And so the State then came
16 back and said we're putting in this new policy, we will
17 give them new hearings under the new policy?

18 MR. LOBEL: No. The -- the State never
19 implemented the new policy. The court said what you
20 should do is give them hearings, which give them notice
21 sufficient to explain what's going on, render a final
22 decision which explains what's going on, give them a
23 chance to produce witnesses if they have a -- if they have
24 witnesses, and they gave them hearings --

25 JUSTICE STEVENS: So that even though -- if I

1 understand it correctly, even though there had findings
2 that some inmates have been improperly -- had had
3 inadequate procedure as a predicate to going into the new
4 facility, they can just stay there until the litigation is
5 over.

6 MR. LOBEL: That's right because the district
7 court didn't move any particular prisoner. But what
8 happened was when you --

9 CHIEF JUSTICE REHNQUIST: Where do -- where do
10 we find those findings? Where in the record do we find
11 the findings about individual people?

12 MR. LOBEL: They're -- they're all through the
13 district court's opinion. If you want to look at Mr. Roe,
14 it's at 73 to 76. Mr. Thompson is at 77 to 79. All of
15 these were cases where the district court found people are
16 being put in here on no evidence or essentially no
17 evidence.

18 JUSTICE KENNEDY: And as -- and as to those
19 prisoners, was there a requirement that the -- that the
20 court's procedures be made applicable and so there would
21 have to be a retroactive hearing as to those prisoners?

22 MR. LOBEL: For all the prisoners. Several --
23 several months later, there were new hearings. And what
24 happened then was that the amount of prisoners at this
25 prison went from 330 to where it is right now, which is

1 48, the same in the Federal control -- as in the Federal
2 control unit.

3 JUSTICE BREYER: Can you just give me 1 minute
4 on the other issue?

5 MR. LOBEL: We're talking about 48 prisoners.

6 JUSTICE KENNEDY: Can you tell us on -- on the
7 liberty interest where we started with the --

8 MR. LOBEL: Yes.

9 JUSTICE KENNEDY: -- with the Attorney General,
10 is there a liberty interest in not being transferred from
11 prison 1 -- level 1 to level 2 --

12 MR. LOBEL: No.

13 JUSTICE KENNEDY: -- level 2, that sort of
14 thing?

15 Why is it that there's a liberty interest in
16 being transferred -- I guess being transferred from 4 to
17 5?

18 MR. LOBEL: We argued here that this was an
19 atypical, significant hardship compared not to level 1, 2,
20 3, or 4, but compared to the segregation units, any other
21 prison in Ohio, even the segregation units, and for three
22 reasons, all of which in combination the court of -- the
23 district court held required a finding of liberty
24 interest.

25 One, it's long-term, indefinite. There were

1 over 200 people here who were there for almost as long as
2 the building was open, and there was no reason to believe
3 that they were ever going to get out. It was indefinite.
4 That's very different than Sandin's 30-day disciplinary
5 confinement.

6 JUSTICE SCALIA: I thought there -- there was at
7 least annual review. Isn't -- wasn't there an annual --

8 MR. LOBEL: There was an annual review, but the
9 committee that they set up to review it, made up not of
10 law professors, but made up of correctional officials,
11 said --

12 JUSTICE SCALIA: And a good thing too.

13 (Laughter.)

14 MR. LOBEL: And a good thing, I agree. I would
15 -- I would hate to be doing this.

16 But made up of wardens and deputy wardens, said
17 Mr. Roe, there's no reason you should be here, you should
18 get out. And then based on reasons and evidence, which
19 Mr. Roe never knew, which the committee never knew -- the
20 committee thought Mr. Roe was in there for one reason, and
21 it turned out on trial he was in there for another reason.
22 The classification chief says to him -- says, you're going
23 to stay here another year.

24 Mr. Roe goes back, has a perfect record, does
25 every program he can do. He comes back to the committee.

1 The committee says, Mr. Roe, you should get out of here
2 again. And the classification chief again says, I'm
3 sorry, for no reason I'm just going to keep you here. And
4 at that point you say, well, Mr. Roe, you may be here for
5 the rest of your life, and there's no -- this is not
6 definite like in the control unit where --

7 JUSTICE SCALIA: What does the new policy say
8 about this?

9 MR. LOBEL: Nothing.

10 JUSTICE SCALIA: Nothing about --

11 MR. LOBEL: Nothing.

12 JUSTICE SCALIA: -- about the annual review.

13 MR. LOBEL: It says you get an annual review.
14 They got an annual review. The new policy doesn't say.

15 And what the district court ordered was
16 draconian, that the classification chief, after he does
17 this, without hearing from the inmate, without giving him
18 reasons, has to write a final decision, which gives him
19 some of the reasons that Mr. Roe is being kept there, and
20 that they have to tell him, like they told the prisoners
21 in -- in Greenholtz, what you have to do to get out. What
22 -- and that doesn't seem to me unreasonable. And all you
23 have to do is give a one-paragraph reason. Now, that's
24 the first reason, but that's not the only reason.

25 The State officials testified that this was

1 qualitatively different than any other prisoner, that the
2 level of restriction, the no outdoor recreation for many
3 years, that people have not been outside for years, the
4 small cell with solid steel doors so that they could not
5 hardly talk to anybody or see anybody, that these were
6 conditions --

7 JUSTICE KENNEDY: Did they have reading
8 materials? I --

9 MR. LOBEL: They had reading materials, yes,
10 Your Honor, and they had televisions so they could watch
11 their favorite programs.

12 But they had nobody to talk to. And we -- the
13 experiment that was done with long-term solitary
14 confinement, which this Court itself in the 1890's found
15 caused people to go crazy -- if you have to give people
16 the process that was required here to send the prisoner to
17 a mental institution, you should have to give them at
18 least that process to send them into a situation which is
19 going to send them to the mental institution.

20 (Laughter.)

21 MR. LOBEL: And that's what's involved here.
22 It's a qualitatively different type of experience. And
23 the Seventh Circuit in U.S. v. Johnson said you cannot
24 sentence somebody to -- into solitary confinement for the
25 term of their sentence because it's a qualitatively

1 different type of experience. It's not the 30 days in
2 Sandin. It's not the 7 weeks in Ewing. This is
3 qualitatively different.

4 And to top it off, the third reason is because
5 these people were automatically deemed ineligible for
6 parole. And Justice Scalia, in Sandin, the Court said in
7 this case it's not -- the -- the prisoner isn't being
8 denied parole. Well, here we have evidence that there are
9 prisoners who were -- the parole board said we will
10 release you on parole. All you have to do is get out of
11 the supermax. The committee says -- a correctional
12 officials says, you're ready to go.

13 JUSTICE SCALIA: That's not the whole class,
14 though.

15 MR. LOBEL: Not --

16 JUSTICE SCALIA: You have a class action. It's
17 just a few of them. In fact, there's -- there's no more
18 parole in Ohio, as I understand it.

19 MR. LOBEL: Yes, but a -- the vast -- I believe
20 it's over 90 percent of the people who were in this prison
21 were sentenced under the old rules, under the old parole
22 rules. And in addition, every prisoner who got sent to
23 this prison was delayed parole for the 2, 3, 4, 5, 6, 10
24 years that they were going to spend at this prison. So
25 every prisoner it affected.

1 Thank you very much.

2 CHIEF JUSTICE REHNQUIST: General Petro, you
3 have 3 minutes remaining.

4 REBUTTAL ARGUMENT OF JAMES M. PETRO

5 ON BEHALF OF THE PETITIONERS

6 MR. PETRO: Thank you, Your Honor.

7 It has been pointed out that -- that inmates
8 stay in the prison for many years, but in reality, over
9 600 inmates since the opening of -- of Ohio State
10 penitentiary in 1998 -- over 600 inmates have gone into
11 level 5 and over 550 inmates have left level 5. And so
12 the classification process is an ongoing process.

13 It is now established under an order of the
14 district court, but we submit, Your Honors, that the new
15 policy that was presented in 2002 at the time this case
16 was pending trial, was a policy that provided a process
17 which was the best type of process for a predictive
18 decision. This Court has often deferred to the decision-
19 making of -- of prison officials in seeking to protect the
20 safety and security of the prison.

21 And in this instance, the policy that was put in
22 place and the hearing process, without actually having
23 essentially a fact-finding process, which is what the
24 court has imposed on this process, was the kind of process
25 that allows for prison officials to review a whole variety

1 of additional information even beyond what might be
2 evidentiary.

3 When we think about the conditions in the prison
4 where the inmate is currently housed, if they're at the
5 Lucasville penitentiary in level 4 -- and the conditions
6 there are particularly volatile -- the prison officials
7 need to have the flexibility to make a decision on
8 placement in level 5 not only to protect this inmate but
9 to protect the institution itself and the safety of the
10 inmates and the safety, of course, of -- of the personnel
11 that work at the facility.

12 In the Mathews test, which was applied both by
13 the district court and by the court of appeals, there is
14 clearly an acknowledgement that the interest of the
15 government is very strong. But in the second step of the
16 Mathews test, there's a recognition that additional
17 procedures really add no value to the decision-making
18 process.

19 Here the -- the government needs to have the
20 capacity and the -- the ability to make the best possible
21 decision looking at a whole variety of factors, and to
22 have a procedure put in place by the court that requires a
23 full display of all the evidence that will be presented at
24 the time of hearing, as incorporated in the notice to the
25 inmate that a hearing will be held, and then an

1 acknowledge that there's -- only this evidence is the
2 evidence that -- that is being relied upon really presents
3 essentially a fact-finding hearing where the hearing
4 process that is set forth in New Policy 111-07 is more
5 than just fact-finding. It's kind of an analysis. It
6 gets an opportunity -- provides an opportunity to really
7 assess the attitude of the inmate, the -- the risks that
8 are involved in -- in placement in a -- in a different
9 level in a different penitentiary. It is directed at
10 protecting the safety and the security of the inmates and,
11 obviously, of protecting the -- the safety of the
12 personnel. And it is fully consistent with this Court's
13 precedents.

14 In applying the Mathews test --

15 CHIEF JUSTICE REHNQUIST: Thank you, General
16 Petro.

17 MR. PETRO: Thank you.

18 CHIEF JUSTICE REHNQUIST: The case is submitted.

19 (Whereupon, at 11:16 a.m., the case in the
20 above-entitled matter was submitted.)
21
22
23
24
25